95-1243

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

GERALD FRANK PLUNK
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW.

1. May the government force a defendant to forego one Fifth Amendment protection (self-incrimination) to preserve another (double jeopardy)?

2. May a defendant facing a parallel 21 U.S.C. § 841, et seq. criminal drug prosecution and punitive 21 U.S.C. § 881 civil forfeitures be given a "Hobson's choice"[1] and forced to make, at the 19 U.S.C. § 1609 administrative level, formal, unprotected admissions and claims of ownership of highly incriminating property so as to abrogate his Fifth Amendment privileges and provide a crucial linchpin in the government's criminal case, or be deemed to have "voluntarily abandoned" said property and thus forego his right to protection against double jeopardy and multiple or successive punishments and prosecutions under United States v. $405,089.23 United States Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996); United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996); Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994); Austin v. United States, 113 S. Ct. 2801 (1993); and United States v. Halper, 490 U.S. 435 (1989)?

3. Given said Hobson's choice, may a defendant who is forced to forego administrative claims, be deemed to have waived or forfeited a basic constitutional right such as double jeopardy after the fact with: (a) no showing of a knowing waiver or notice to defendant or counsel of the jeopardy consequences of not contesting the forfeiture, (b) inadequate procedural safeguards, or (c) no showing of voluntary choice?

4. Can an appellate court de novo disturb the lower

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[1]The term Hobson's choice derives from the practice of Thomas Hobson (died 1631), an English liveryman, who required every customer take the horse nearest the door (1649): an apparently free choice when there is no real alternative. Webster's Ninth New Collegiate Dictionary, c. 1990.

court's factual findings, which were not clearly erroneous and which were supported by affidavits of Mr. Plunk and his counsel, that there was no abandonment of property or forfeiture or waiver of Fifth Amendment double jeopardy protection due to the Hobson's choice presented by then-existing law as to inapplicability in administrative forfeiture proceedings of the "limited use immunity" doctrine of Simmons v. United States, 390 U.S. 377 (1968)?

5. Given the government's tactical decision to implement a 21 U.S.C. § 841, et seq. criminal drug prosecution and parallel 21 U.S.C. § 881 punitive civil forfeiture proceedings, obtaining specific 19 U.S.C. § 1609(b) judgments adjudicating Mr. Plunk as owner and forfeiting his property, and arguing at detention hearings and specifying in the grand jury indictment that certain property was incriminating and belonged to Mr. Plunk, is the government precluded by the doctrines of estoppel and res judicata from denying that Mr. Plunk was the owner of the forfeited property and that he therefore suffered prior forfeiture and punishment so as to preclude further prosecution?

6. Did Simmons v. United States, 390 U.S. 37 (1968), hold "limited use immunity" applies to civil forfeiture proceedings; and if not, has any authority binding in the Ninth Circuit so held prior to the Ninth Circuit's holding in United States v. Cretacci, 62 F.3d 307, 311 (9th Cir. 1995)?

7. Should the Simmons "limited use immunity" doctrine now be extended to protect admissions and claims of ownership made by a property owner and defendant in punitive forfeiture proceedings under 19 U.S.C. § 1609 and 21 U.S.C. § 881?

8. If such Simmons "limited use immunity" is now so extended, can the new rule of law establishing same and the companion holding of implied "voluntary abandonment," forfeiture, and waiver of double jeopardy by failing to file a claim be applied retroactively to Mr. Plunk and others similarly situated who relied in good faith on the "old law" to their detriment?

9. Does it violate fundamental fairness and due process of law to force a defendant to forego a defense to punitive administrative forfeitures to preserve Fifth Amendment privileges based upon existing law and then, based on a change in the law, retroactively deny double jeopardy protection notwithstanding said prior punishments?

10. Given the grant of certiorari in $405,089.23 and Ursery, should this court simultaneously grant certiorari in the instant matter, in United States v. Baird, 63 F.3d 1213 (3d Cir.), petition for cert. filed, 64 U.S.L.W. 3318 (U.S. Oct. 17, 1995), and in United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), reh'g en banc denied November 15, 1995,[2] so as to foreclose the government from gaining the precise improper and unconstitutional tactical advantage and result precluded, i.e. punitive deprivation of one's property without jeopardy consequences or meaningful due process of law via exploiting the "Hobson's choice" presented by parallel prosecutions which force a defendant to "fight on two fronts"?

11. Was is improper for the Ninth Circuit, in Plunk and Cretacci,[3] to blend the first half of 19 U.S.C. § 1609(a), which addresses when one can declare property as to which "no...claim is filed...forfeited," with the second half of § 1609(a), which authorizes property that is already forfeited to be disposed of in the "same manner as merchandise abandoned to the United States," so as to manufacture a finding of voluntary abandonment?

12. Given the factual basis for the indictment, does a double jeopardy bar to further prosecution of Mr. Plunk for the conspiracy and distribution counts due to prior punishment for same via punitive forfeitures also bar prosecution for the continuing criminal enterprise and telephone counts under the lesser included-same offense doctrine?

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[2]Counsel is informed Mr. Cretacci's counsel will soon file a timely Petition for Writ of Certiorari.

[3]See Cretacci, 62 F.3d at 310; United States v. Plunk, Memorandum Opinion at 1-2 (9th Cir. Oct. 17, 1995).

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Petitioner, Gerald Frank Plunk, respectfully prays a Writ of Certiorari issue to review the judgment and opinion herein of the United States Court of Appeals for the Ninth Circuit.

IV. REFERENCE TO OPINIONS IN THE CASE.

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was rendered in an unpublished memorandum opinion filed October 17, 1995 in Ninth Circuit Nos. 94-30421 and 94-30422. (Appendix (hereinafter "App.") 1). Petitioner's Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied December 14, 1995. (App. 29.) The Honorable John W. Sedwick's unpublished findings and conclusions were entered November 17, 1994 in United States District Court Alaska Case No. CR-94-036-01 (JWS). (App. 4-15.) Magistrate Judge John D. Roberts' unpublished Recommendations were entered November 4, 1994 in No. CR-94-036-01 (JWS). (App. 16-28.)

V. GROUNDS FOR JURISDICTION.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1254. The Petition is timely as the initial Judgment and Opinion was filed October 17, 1995; a timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied December 14, 1995.

VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Fifth Amendment of the United States Constitution, 19 U.S.C. § 1609, 21 U.S.C. § 841, et seq., and 21 U.S.C. § 881, et seq. The text of same and related jurisdictional statutes and procedural rules are set out in the Appendix at pp. 32-46.

VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

This petition seeks review of the Ninth Circuit's opinion

in Cause No. 94-30421, an appeal by the government pursuant to 18 U.S.C. 3731, which reversed and remanded the trial court's final order which granted in part petitioner's motion to dismiss the indictment on grounds that punitive administrative forfeitures of his property constituted prior "punishments" for Fifth Amendment double jeopardy purposes precluding subsequent criminal prosecution for the same underlying criminal offenses. The opinion also dismissed as moot petitioner's interlocutory appeal in Cause No. 94-30422 taken pursuant to 28 U.S.C. § 1291 and Abney v. United States, 431 U.S. 651 (1977), which had sought such reversal insofar as the trial court, only partially granted Mr. Plunk's motion to dismiss, yet specifically found Mr. Plunk had been previously punished by punitive forfeiture of his property based upon certain criminal offenses, including the conspiracy and distribution counts under 21 U.S.C. § 841, et seq. Given the manner in which the indictment was pled, the Count I conspiracy was a lesser included of the Count II continuing criminal enterprise under Jeffers v. United States, 432 U.S. 137 (1977).[4] The district court had jurisdiction pursuant to the double jeopardy clause of the Fifth Amendment, 21 U.S.C. § 841, et seq., and Art. III, § 2, cl. 1 of the United States Constitution.

A. The Various Crimes And Conduct Alleged.

Several related allegations against Mr. Plunk included:[5]

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[4]The district court misapplied the Blockburger and Dixon "same offense" test. Further, utilizing the "factual allegation of the charging documents" analysis of Dixon, as discussed in United States v. Liller, 999 F.2d 61, 62 (2d Cir. 1993), the telephone counts also included as lesser included offenses, the jeopardy-barred Count 1 conspiracy and Count 9, 10 and 11 distribution offenses. See United States v. Dixon, 113 S. Ct. 2849 (1993); Jeffers v. United States, 432 U.S. 137 (1977); and Blockburger v. United States, 284 U.S. 299 (1932). Moreover, the factual basis for the seizures and forfeitures under the search warrant affidavit included the telephone offenses. (App. 90.)

[5]See indictment of 3-22-94 (App. 85-86), superseding indictment of 4-26-94 (App. 70-84), Judge Sedwick's order (App. 4-15) and Magistrate Roberts' recommendations (App. 16-28).

a. Conspiracy alleged in the one-count indictment of 3/22/94 "to distribute cocaine in Alaska from the 'Fall of 1987 until no later than April, 1991' in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the 'Alaska I conspiracy')" (App. 85-86);

b. Allegations in Count 1 of the superseding indictment of 4/26/94 of conspiracy with co-defendant Pierson and other persons "to transport cocaine shipped from Colombia across the 'Lower 48' states of the Union from April 1, 1993 in violation of 21 U.S.C. § 841(a)(1) and § 846 (the 'Lower 48' conspiracy)" (App. 71-76);

c. Allegations in Count 2 Mr. Plunk engaged in a "continuing criminal enterprise from about April 1993 through December 1993 in violation of 21 U.S.C. § 848." (App. 76-80.) Given the factual allegations, including the first of the continuing series of violations alleged at pages 10 through 12, this count includes as a lesser included offense the "Colombian/Lower 48 Conspiracy" of Count 1;

d. Allegations in Counts 3, 4, 5 and 6 Mr. Plunk used a "communications facility to facilitate drug trafficking in violation of 21 U.S.C. § 843(b)" (App. 80-81);[6]

e. Allegations in Counts 9, 10 and 11 Mr. Plunk distributed cocaine in violation of 21 U.S.C. § 841(a), also alleged as overt acts of the "Colombian/Lower 48 Conspiracy" in Count 1, as specified at ¶¶ D.1-20, and alleged as violations in furtherance of the continuing criminal enterprise in Count 2 as specified at ¶¶ A.2-9[7], such distribution counts also allegedly facilitated in telephone counts 3 through 6; and

f. Allegations in Count 12 of conspiracy to "distribute cocaine in Alaska from the Fall of 1980 until December 31,

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[6]Given the factual allegations in Counts 3-6 of facilitating a conspiracy to distribute cocaine and distribution of cocaine, and further, specific allegations in Section A, Count 2, ¶¶ 2, 4, 5, 6, 7, 8 and 9 (continuing criminal enterprise violations referencing phone counts and distribution counts), Count 1, Section D, ¶¶ 1-20 (overt acts of distribution and phone calls as to conspiracy), and in the distribution Counts 9, 10, and 11 as to dates and quantities, said telephone counts include as lesser included offenses (i.e. necessary elements) the "Colombian/Lower 48 Conspiracy" and distribution of cocaine offenses in Counts 1, 9, 10 and 11 allegedly facilitated.

[7]See App. 82-83, 74-76, 77-78.

1993 (the 'Alaska II' conspiracy)." (App. 83-84.)

B. Mr. Plunk's Indictment And Arrest, Search Of His Home, Seizures And Forfeitures Of His Property And Resulting Prior Punishments.

Mr. Plunk was arrested March 25, 1994 on a warrant issued under the original indictment, the "Alaska I conspiracy." On March 22, 1994 the government obtained a search warrant based on DEA Agent Cayford's affidavit (App. 87-91), with searches and seizures of Mr. Plunk's property from his home on March 24, 1994. (App. 7.) Mr. Plunk was detained at detention hearings of 3-30-94, 4-22-94, and 5-9-94 before Magistrate Roberts. (App. 17-22.) A superseding indictment was returned on 4-26-94. (App. 70-84.)

The government made a tactical choice, in violation of Halper, Austin, Kurth Ranch, $405,089.23, and Ursery, to "force a fight on two fronts," via a 21 U.S.C. § 841, et seq. criminal drug prosecution under the superseding indictment and parallel administrative punitive civil forfeitures under 19 U.S.C. § 1609 and 21 U.S.C. § 881 against evidence seized from Mr. Plunk's person and/or his home.

The government's theory for detention and indictment was that ownership of the property targeted for forfeiture was proof of guilt. Some of the property seized was specified as incriminating and subject to forfeiture under the superseding indictment,[8] and related incriminating property was subject to the punitive administrative forfeiture proceedings. Based upon the government's theory in the detention hearings and indictment, it was clear, given the state of the law, namely, that Simmons "use immunity" did not preserve Fifth Amendment privileges for statements made at administrative forfeiture proceedings, Mr. Plunk and his counsel could not jeopardize his criminal defense by filing formal administrative claims of ownership to contest forfeiture. A classic

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[8]Count 2 of superseding indictment at ¶ 10, Sec. B(1) and Count I ¶ 10, Sec. C. (App. 74, 78.)

"Hobson's choice" was presented.[9] (App. 47-53.)

Gerald Frank Plunk was subject to four prior judgments, punishments, and jeopardy events; four separate punitive seizures and 19 U.S.C. § 1609(b) forfeitures,[10] i.e. Final Adjudication(s) of Ownership/Declaration(s) of Forfeiture/Judgment(s) of Forfeiture and Punishment based on offenses in the initial and superseding indictments.[11]

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[9]Admitting, via formal verified administrative forfeiture claims signed by Mr. Plunk, ownership of the guns, gold, watch or cash would provide a major linchpin in the Government's case, to wit, tying Mr. Plunk to the co-conspirators and home, guns and cash seized therein, including cash distinctively vacuum-sealed to link Mr. Plunk to related vacuum-sealing machines and drug prosecutions in New York and Los Angeles, as specifically alleged in the indictment at Count 2, ¶B.1 and Count 1, ¶C.10. (App. 74, 78.) As established by sworn affidavits of Mr. Plunk and his counsel, Mr. Weidner, and the lower court's specific findings, due to this "Hobson's choice" and existing case law, formal administrative ownership claims were not filed. (App. 47-53.) Both of these affidavits preceded the ground-breaking (and as discussed infra at 26, ill-advised) new rule in Cretacci that Simmons "use immunity" now applies to admissions and/or claims of ownership of incriminating property in administrative forfeiture matters by approximately nine months. The forced decision to forego contesting forfeiture was approximately fifteen months before Cretacci. Quite simply, Mr. Plunk's forced forbearance not to contest the forfeitures merely reflected the advice any competent defense counsel was constrained to give based upon the state of the law, which any prudent defendant was required to follow; forego incriminating administrative claims or forfeiture defenses as to incriminating property to preserve Fifth Amendment privileges given parallel punitive forfeiture proceedings and criminal prosecution. The government took tactical advantage of these Fifth Amendment concerns by obtaining final 19 U.S.C. § 1609(b) judgments of forfeiture adjudicating Mr. Plunk as owner to punish him.

[10]Significantly, 19 U.S.C. § 1609(b) provides: a declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States." (Emphasis added.)

[11]The seizures and punitive forfeitures of Mr. Plunk's property were:

1. A Rolex wristwatch valued at $1,500 seized from his wrist by a DEA agent at arrest, under 21 U.S.C. § 881(a)(6) (Notice of

These punitive forfeitures and punishments were forfeiture of a watch seized from his wrist by the DEA at his arrest, and money, guns and gold seized from his home under a search warrant based on offenses in the indictments.[12]

Given the government's conscious tactical decision, solely within the power of the government, to force a "fight on two fronts," i.e. punitive administrative civil forfeiture and criminal forfeiture and indictment, defendant and counsel were powerless to make any strategic jeopardy decisions; neither voluntarily "abandoned" his property or "waived" or "forfeited" his double jeopardy protection.

C. Magistrate Roberts' Recommendation.

Magistrate Roberts issued the search warrant and presided at the detention hearings. He specifically found the property was Mr. Plunk's, he had been punished, and there was no "abandonment," "waiver," or "forfeiture" of double jeopardy protection due to the Hobson's choice:

> The Government cannot seriously argue that the administrative forfeitures in this case do not refer to

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Seizure no. 152090, 4-18-94) Final Judgment of Forfeiture under 19 U.S.C. § 1609(b) of 6-3-94, adjudicating Mr. Plunk as the owner. Judge Sedwick found said seizure, forfeiture and punishment based on the Alaska I conspiracy. (App. 13.)

2. Seizures at Mr. Plunk's residence on 3-24-94 of: (a) Assorted firearms valued at $4,040 (Notice of Seizure No. 152183, April 25, 1994), Final Judgment of Forfeiture under 19 U.S.C. § 1609(b), 6/10/94, adjudicating Mr. Plunk as owner; (b) Currency of $9,660 (Notice of Seizure No. 152199, May 9, 1994) Final Judgment of Forfeiture under 19 U.S.C. § 1609(b), 6/24/94, adjudicating Mr. Plunk as owner; and (c) Three bags of placer gold valued at $967.89 (Notice of Seizure No. 152824, May 9, 1994), Final Judgment of Forfeiture under 19 U.S.C. § 1609(b), 8/19/94 adjudicating Mr. Plunk as owner. (App. 54-69.)

[12]Both judges examined the factual basis for seizures and forfeitures incident to the search and arrest warrants and so found. (App. 11-13, 15, 22.)

property associated with the criminal defendant. The search warrants authorized searches of Plunk's property; the seizure notices reference Plunk, and the underlying investigation; and the indictment ties the property to Plunk. The record shows that Plunk was arrested for conduct giving rise to the administrative seizures and forfeitures as well as the indictment. The government's evidence at the bail hearing linked some of the personal property forfeited to Plunk. The government wants the court to find that Plunk has not been "punished" through civil forfeitures because he was not a party to those proceedings. At the same time, the government would deny him standing to assert a claim unless he waived his Fifth Amendment rights to assert standing. The government cannot have it both ways.

Plunk relies on the government's use of seized evidence at the bail hearing to illustrate that some of the property referenced in the administrative forfeiture actions is the same property and relates to the same offenses for which he is being prosecuted. At the bail hearing the government argued that Plunk was using the firearms and money to facilitate the underlying conspiracy to traffic in controlled substances. Plunk refers to the bail hearing to show the interplay of his right against self-incrimination in the civil forfeiture proceedings and in the criminal prosecution.

Recommendation Regarding Motion to Dismiss on Grounds of Double Jeopardy of Magistrate John D. Roberts, November 4, 1994, at pp. 8-9 (emphasis added). (App. 22.)

D. Judge Sedwick's Order.

Based on these recommendations, and independent de novo review of the bases for the seizures and forfeitures, Judge Sedwick agreed with Magistrate Roberts' assessment of the Hobson's choice and that there was no abandonment of the property or waiver or forfeiture of Fifth Amendment double jeopardy protection, found the forfeited property was

Mr. Plunk's, that it was adjudicated as his under 19 U.S.C. § 1609(b), and Mr. Plunk was thus previously punished:

> The declarations of forfeiture all identify Plunk as the property's owner at the time of seizure.[3]
>
> * * *
>
> DISCUSSION
>
> The magistrate judge recommended that Plunk's double jeopardy motion be granted at docket 208. *Based upon this court's de novo review, with the exception of the implied finding of fact and related conclusion of law that the administrative forfeitures are based upon all the same offenses as those with which Plunk is charged in the superseding indictment, the findings and conclusions made by the magistrate judge are correct and are adopted.* The implied factual finding and related conclusion that the administrative forfeitures are based upon the same offenses requires discussion.
>
> * * *
>
> This court finds that the crimes the Government had reason to believe Plunk had committed at the time of the seizures and upon which the administrative forfeitures proceeded were that Plunk possessed cocaine with intent to distribute it in Alaska, that Plunk possessed cocaine with intent to distribute it somewhere outside Alaska, and that Plunk was a member of the Alaska I, Alaska II and Lower 48 conspiracies. When this finding is coupled with the other findings and conclusions reached by the magistrate judge and adopted by this court, it follows that counts 1, 9, 10, 11 and 12 must be dismissed, because Plunk cannot be put in jeopardy on charges for which he has already been punished.

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[3] Plunk did not contest the forfeitures. His briefing indicates that the decision not to file a claim to the property was made in order to preserve his Fifth Amendment right not to testify.

Order From Chambers of the Honorable John W. Sedwick, November 17, 1994, at pp. 4, 7, 12 (italics added, underline emphasis in original). (App. 7, 9, 13.)

These findings were supported by affidavits of Mr. Plunk and counsel, and are not clearly erroneous.[13]

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13 6. I further received notice of administrative seizures 152199, 152824, and 152183 with regard to certain currency, gold an guns allegedly seized from my residence, and upon the advice of my counsel, pursuant to my concerns and my attorney's concerns of the impact on my defense in the underlying criminal charges, I did not file formal claims at the administrative level given the advice of counsel and my concerns as they related to allegations made by the government in the superseding indictment and at the bail hearing and otherwise with regard to the significance of said items, namely, to the effect that admitting formal ownership and possession of said items might tend to incriminate me within the meaning of the Fifth Amendment of the United States Constitution, as to the criminal charges in this case.

Affidavit of Gerald Frank Plunk of November 2, 1994 at 2, United States v. Plunk, Case No. A94-0036 CR (JWS) (emphasis added). (App. 48.)

5. Based upon my understanding of the government's allegations in the indictment and informal and/or formal discovery herein, including the fact that they were alleging that there was a critical "heat sealing" or "vacuum sealing" "food sealing" machine which was allegedly discovered in a cocaine conspiracy case on the East Coast that had allegedly been used to package money and the fact that said machine was allegedly traced to a purchase by Mr. Plunk, and further my understanding that certain of the items the subject of the above-referenced seizures (i.e. the guns, gold, and currency, Seizure Nos. 152199, 152824, and 1521831) related to ownership and/or possession of currency allegedly seized at Mr. Plunk's residence (including Search Warrant No. A94-0049 MJ, inventory nos. N-127, N-109, and N-112) and further based upon my understanding that the government was alleging that certain sales of drugs had been made out of that residence by Mr. Plunk to a cooperating witness, and further, based upon my understanding of the federal sentencing and substantive laws with regard to firearms and controlled substances, and further, based upon my understanding

E. The Erroneous Ninth Circuit Opinion.

The Ninth Circuit's Plunk opinion ignored these specific factual findings by Magistrate Roberts and Judge Sedwick.

The opinion conflicts with $405,089.23 and Ursery, and raises constitutional questions of exceptional importance under the Fifth Amendment double jeopardy, self-incrimination, and due process clauses.

Relying on United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), reh'g en banc denied Nov. 15, 1995, the opinion overlooks and misconstrues material points of fact and law:[14]

1. Declaring Mr. Plunk "abandoned" property and did not suffer "punishment" under the double jeopardy clause (Plunk, slip op. at 1, citing Cretacci, 62 F.3d at 310);

2. Holding that because Mr. Plunk did not file a formal claim to the seized and forfeited property "he was not punished when it was forfeited" and because he "was not a

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> of the government's allegations and evidence and the court's findings at the bail/detention hearing, I advised Mr. Plunk that in order to protect his rights against self-incrimination and to not prejudice his defense with regard to the criminal charges in the underlying superseding indictment that he should not file a formal claim at the administrative level with regard to said seizures. This advice was further based upon my understanding of the government's position and/or case law with regard to attempts to preserve Fifth Amendment privileges while litigating administrative and civil forfeitures brought by the government as a result of alleged controlled substance activities.

Affidavit of Phillip Paul Weidner, 11-2-94, pp. 2-3, United States v. Plunk, Case No. A94-0036 CR (JWS) (emphasis added). (App. 52-53.)

[14]As noted, counsel is informed Mr. Cretacci's counsel will soon file a timely Petition for Writ of Certiorari. In light of certiorari in $404,089.23 and Ursery, this Court should grant same in conjunction with the instant Petition and the pending Petition for Writ of Certiorari in United States v. Baird, 63 F.3d 1213 (3d Cir.), Petition for cert. filed, 64 U.S.L.W. 3318 (U.S. Oct. 17, 1995), and consolidate oral argument.

party to the prior administrative forfeiture, he was not in jeopardy;" id. at 2;

3. Holding "a defendant's claim of ownership of property that was subject to forfeiture may not be used [to prove the defendant's guilt]" (Id. at 3) thereby extending Simmons "use immunity" protection to administrative forfeiture claims and proceedings in contradiction to Ninth Circuit authority of Baker v. United States, 722 F.2d 517 (9th Cir. 1983), and United States v. $15,500 U.S. Currency, 558 F.2d 1359 (9th Cir. 1977) (said cases indicating an incriminating administrative claim of ownership is not protected by the Fifth Amendment privilege against self-incrimination, and, by inference, not protected by Simmons);

4. Improperly misconstruing the 19 U.S.C. § 1609(b) forfeitures, which were Final Administrative Adjudications of Ownership, Declarations of Forfeiture, and Judgments of Forfeiture and Punishment, and holding that they did not constitute a "judicial adjudication of ownership" but were merely "computer generated" and meaningless, notwithstanding that the Declarations of Forfeiture state "Owner: Plunk, Gerald F," and that the statute provides that said declarations have "the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States;" and

5. Erroneously applying, retroactively to Mr. Plunk, the two new Cretacci rules of Simmons "limited use immunity" and that administrative claims must be made to preserve double jeopardy protection, contrary to United States v. Givens, 767 F.2d 574 (9th Cir. 1984) cert. denied, 474 U.S. 953 (1985) (new decisions mandating defendant to speak to preserve a claim cannot be applied retroactively if silence adduced by reliance on prior circuit law), without permitting Mr. Plunk to brief and argue retroactivity or Simmons.

VIII. REASONS FOR GRANTING CERTIORARI.

A. Given The Grant Of Certiorari By This Court In $405,089.23 And Ursery, The Court Should Grant Certiorari In Plunk, Baird And Cretacci.

The well-reasoned decisions in $405,089.23 and Ursery

establish the government cannot, in violation of Halper, Kurth Ranch and Austin, gain tactical advantage and "force a fight on two fronts" by first taking a citizen's property via punitive forfeiture and then subsequently criminally prosecute for the same offense, or criminally prosecute for an offense and subsequently, in a separate proceeding, seek punitive forfeiture based on same. These decisions are based upon the foundation of the Fifth Amendment prohibition against double jeopardy and successive prosecutions and trace their origins to Greek and Roman law. See $405,089.23, 33 F.3d 1210 at 1215. It is crucial to grant certiorari in the instant matter, Baird, and Cretacci, to avoid preserving a "loophole" for the government to continue such a practice in the future without such double jeopardy protection or consequence. The Cretacci and Plunk panels denied double jeopardy protection under the transparent subterfuge that there had been voluntary "abandonment" of the property in the administrative proceedings, notwithstanding the fact that based upon then-existing case law, as discussed more fully herein, the "limited use immunity" in Simmons afforded to statements made to obtain standing in Fourth Amendment suppression motions did not protect a property owner claiming incriminating property in an administrative forfeiture proceeding. Not only is such an extension of Simmons use immunity ill-advised in terms of policy considerations for the courts, as discussed infra at 26, but it is far from clear that such Simmons "limited use immunity" will in fact be afforded in the future to defendants in circuits other than the Ninth Circuit since Cretacci was the first case to so rule, and the other circuits have not yet adopted such an ill-advised and unprecedented doctrine. The government can continue to gain tactical advantage by instituting punitive forfeitures as to potentially incriminating property, secure in the knowledge any competent defense counsel would be committing malpractice to advise a target defendant to do other than to forego making administrative forfeiture claims, and that any defendant must follow said advice. The government can then claim "abandonment," and the underlying holding of $405,089.23 and Ursery and, more critically, the underlying principles and policies of the double jeopardy clause, will be emasculated.

B. Use Of The Legal Fiction Of "Abandonment" Of Property To Avoid The Double Jeopardy Bar Violates Basic Constitutional Doctrines; Manufacturing The Concept Of Abandonment Violates Fundamental Fairness And Due Process Of Law.

Neither Mr. Plunk nor counsel voluntarily abandoned his property or waived or forfeited double jeopardy rights and had no choice under existing law but to forego a claim; the Plunk panel cannot disturb the lower court's specific factual findings on these issues, nor may the new law announced in Cretacci be applied retroactively to defeat the truth. The legal fiction of abandonment violates fundamental fairness and due process.

The Ninth Circuit's holding that failure to file a claim and cost bond constitutes abandonment of seized property is disingenuous, erroneous, and ignores the "Hobson's choice" presented by then-existing case law and the government's tactical decision, solely within its power to make, to expose Mr. Plunk to parallel jeopardy proceedings and force him and counsel, in violation of the ancient underpinnings of the double jeopardy clause to "fight on two fronts," i.e. to contest a punitive administrative civil forfeiture and defend against a criminal forfeiture and criminal indictment.

1. Factually and Legally, There was no Abandonment of Property or Waiver or Forfeiture of Double Jeopardy.

Forced relinquishment or forbearance of a claim is not abandonment. One must also distinguish relinquishing expectations of privacy and abandoning ownership.

> Fourth Amendment Constitutional law notions of abandonment do not apply. Abandonment in the strict property right sense is to be distinguished from abandonment in search and seizure cases where the issue is merely whether the individual has relinquished his interest in property so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. [citations.] 'Mr. Justice Frankfurter in *Jones v. United States*, 362 U.S. 257,

80 S. Ct.. 725, 4 L.Ed.2d 697 (1960), admonishes that it is unnecessary and ill-advised to import into the law of constitutional search and seizure the subtle distinctions of private property law.' Katsaris v. United States, 684 F.2d 758, 761 (11th Cir. 1982) (citations omitted, emphasis added).

Here there was no voluntary intent to abandon. Abandonment, as applied to property law, requires:

> [A] positive intent to part with ownership. It is essential that the owner act without coercion or pressure. The doctrine of abandonment has no application unless there is a total desertion by the owner without being pressed by any necessity, duty, or utility to himself, but simply because he no longer desires to possess the thing and willingly abandons it to whoever wishes to possess it. Id. at 762 [citations omitted, emphasis added].

In Katsaris, the IRS tried to claim funds to which the defendant disclaimed ownership. The Eleventh Circuit determined Mr. Katsaris did not abandon money. His sole purpose in disclaiming the funds was to separate himself from incriminating evidence in a criminal prosecution, which does not meet the test the abandonment be voluntary, "without coercion or pressure, or without the owner being pressed by any necessity or utility to himself." Id. at 762.

The Ninth Circuit's concept of abandonment in search and seizure cases merely addresses Fourth Amendment privacy rights as to relinquishment of property prior to seizure by the Government. United States v. Huffhines, 967 F.2d 314, 318 (9th Cir. 1992), United States v. Nordling, 804 F.2d 1466, 1469 (9th Cir. 1986). Even in the Fourth Amendment context, the abandonment of property must be "voluntary." Huffhines, 967 F.2d at 318; United States v. Kendall, 655 F.2d 199, 200 (9th Cir. 1981); United States v. Berd, 634 F.2d 979, 987 (5th Cir. 1981). Whether or not property has been abandoned turns on intent. "[T]he inquiry should focus on, whether, through words, acts or other objective

indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure." Nordling, 804 F.2d at 1469. See also United States v. Hernandez, 7 F.3d 944, 947 (10th Cir. 1993). Abandonment has been demonstrated when a suspect leaves his property unattended in a public place or denies ownership. United States v. Most, 876 F.2d 191, 198 (D.C. Cir. 1989). In United States v. Brady, 842 F.2d 1313, 1316 (D.C. Cir. 1988), the court held that a "spontaneous denial of ownership, unaffected by police provocation, demonstrates sufficient intent of disassociation to prove abandonment." However, "[t]he law obviously does not insist that a person assertively clutch an object in order to retain the protection of the fourth amendment." United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989).

The use of the subterfuge of "abandonment" when in truth and reality there was no such voluntary option given or choice made is to use the exact sort of legal fiction condemned in $405,089.23 ("We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single, coordinated prosecution.'" $405,089.23, 33 F.3d at 1217.

It may be that via his forced failure to file a claim and cost bond, Cretacci waived his Fifth Amendment due process rights to contest the forfeiture, but it does not follow that by his yielding to the "Hobson's choice" and not filing any such incriminating claim Mr. Plunk also gave up his double jeopardy rights to protection against multiple punishment for the same offense in subsequent prosecutions.[15]

Mr. Plunk and counsel did not "abandon" the property; they merely did not contest the forfeitures since they could not do so in light of valid Fifth Amendment concerns based on then-existing case law. The forfeiture was nonetheless of

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[15] I.e., one must likewise distinguish seizure of abandoned property which does not implicate a former possessor's privacy rights and uncontested forfeiture of property which does not violate due process property rights. The latter still is a taking that constitutes punishment.

property that Mr. Plunk had not voluntarily relinquished, and thus he suffered punishment.

In Huffhines, the Court held that a defendant denying ownership or knowledge of a car linked to keys found on his person meant that the defendant could not challenge the search in light of such disavowing of any connection to the car. 967 F.2d 318. In Nordling, a similar result was reached where the defendant denied ownership of luggage and there was a physical relinquishment of same, which the Court held was inconsistent with the continuing expectation of privacy. Significantly, the property in both instances had been abandoned before the government began its searches and seizures. In Mr. Plunk's case, the government forcibly seized the property and began forfeiture before any alleged "abandonment." By presenting Mr. Plunk and counsel with the "Hobson's choice," the government was able to orchestrate action which it now claims is abandonment, i.e. precluding the filing of a mandatory but incriminating claim of ownership to preclude administrative forfeiture. In both Huffhines and Nordling an affirmative act was required to show abandonment. Mr. Plunk and counsel were precluded from taking any action in an administrative claim as to property that was forcibly seized and taken from Mr. Plunk and by no stretch of the imagination, voluntarily abandoned.

As Magistrate Wayne Brazil's courageous analysis of the Hobson's choice issue in his report and recommendation in United States v. Ailemen, 1995 WL 442603 (N.D.Cal. 1995),[16] states:

> First, it is not at all clear that Pius Ailemen's decision not to contest the civil forfeiture was in any meaningful sense "voluntary." He has advised the court, through counsel, that even though the property

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[16]This unpublished Report and Recommendation is referred to by the Dissent in the Order Denying Rehearing in United States v. $405,089.23 in U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), amended on denial of reh'g, 56 F.3d 41 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996). Ten copies of Ailemen are included herewith.

in question was his, and even though he would challenge the assertion that it "was used or acquired as a result of a **drug-related offense**," he decided not to file a claim and contest the forfeiture in order to preserve his Fifth Amendment right not to incriminate himself. In other words, he felt constrained to choose between his right to claim his property and his right not to incriminate himself. A decision made under such restraint is not fairly considered "voluntary." *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (9173); and *Garrity v. State of New Jersey*, 385 U.S. 493 (1967).

* * *

[I]t is a complete figment of jurisprudential imagination to suggest that Pius Ailemen "voluntarily" decided not to contest the forfeitures in issue here. He was effectively coerced into that decision--so it would be quite unfair to visit upon him the loss of his Double Jeopardy rights as a consequence of that decision. Id. at pp. 28-29, 39 (emphasis added).

The Cretacci panel's manufacture of "abandonment" via forced forbearance of a claim of ownership improperly blends the portion of 19 U.S.C. § 1609(a) addressing adjudication, i.e. a property not claimed is to be deemed "forfeited," with the manner of disposition, i.e. it may be sold "in the same manner as merchandise abandoned in the United States." Significantly, nowhere in the statutory scheme is there any provision the property is to be deemed "abandoned."

C. It Is Fundamentally Unfair And A Violation Of The Due Process, Self-Incrimination And Double Jeopardy Clauses Of The Fifth Amendment To Disingenuously Claim Mr. Plunk And His Counsel Were Not Forced To Forego A Claim Or Defense In The Punitive Administrative Forfeiture Proceedings; Then-Existing Case Law Held Such A Claim Or Defense Would Have Been Available To The Government To Incriminate Mr. Plunk In The Parallel Criminal Matter.

At the time Mr. Plunk, Mr. Cretacci and their counsel

were forced to forego administrative claims: (1) under uniform pre-existing case law of the Ninth Circuit and other circuits, there was no procedural or substantive way to assert the Fifth Amendment at the administrative claim level except by remaining silent and not filing a claim of admission or ownership; (2) by statute, regulation and case law an unprotected, non-privileged, mandatory and incriminating personal claim and admission of ownership of incriminating property was required to defeat summary administrative adjudication of forfeiture; and (3) doing so would clearly have been fatal to Mr. Plunk's defense given the incriminating nature of the property at issue.[17]

Thus, Cretacci's holding that, "an owner who receives notice of the intended forfeiture and fails to claim an ownership interest in the property has effectively abandoned it," has no statutory basis or foundation in prior case law.

Mr. Plunk and counsel cannot be retroactively held chargeable with knowledge of Cretacci's new extension of the Simmons "use immunity" doctrine to administrative forfeiture claims. As Cretacci, Simmons, and other Supreme Court authority hold, a defendant cannot be forced to "waive" one constitutional right (Fifth Amendment self-incrimination) to

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[17]See United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983). The court held the owner was required to "choose between preserving his privilege against self incrimination and losing the civil suit." (Emphasis added.) United States v. Kordel, 397 U.S. 1 (1970), held an attempt to retroactively claim the Fifth Amendment was not allowed as to prior admissions. Mr. Plunk and counsel avoided this fatal result, foregoing formal administrative claims and admissions, preserving the Fifth Amendment privilege, and suffering punitive forfeitures. United States v. Premises Located at Route 13, 946 F.2d 749 (11th Cir. 1991), acknowledged "the Fifth Amendment is violated when a person, who is a defendant in both a civil and a criminal case, is forced to choose between waiving his privilege against self-incrimination or losing the civil case on summary judgment." 946 F.2d at 756, citing Pervis v. State Farm Fire & Casualty Co., 901 F.2d 944, 946-47 (11th Cir.), cert. denied, 498 U.S. 899 (1990). See also United States v. U.S. Currency, 626 F.2d 11 (6th Cir.), cert. denied, 449 U.S. 993 (1980).

protect another (standing to assert Fourth Amendment rights). To hold Mr. Plunk "abandoned" or "forfeited" double jeopardy protection is contrary to precedent stating one need not assert a double jeopardy right at an initial prosecution and punishment to enjoy double jeopardy protection from subsequent attempts at prosecution. The required analysis is one of "waiver" as opposed to "forfeiture." There was clearly no knowing waiver since there was no notice to Mr. Plunk or counsel of the jeopardy consequences of foregoing an administrative claim to preserve his Fifth Amendment rights based on existing case law and there was no procedural safeguards to ensure a knowing waiver or "forfeiture" of such double jeopardy protection. See United States v. Broce, 488 U.S. 563 (1989), and United States v. Olano, 113 S. Ct. 1770, 1777 (1993) (establishing procedural safeguards for waiver and disavowing forfeiture analysis for double jeopardy in the absence of a guilty plea in the second prosecution). See also 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶ 9.03 at 9-43 (1995); Mennonite Board of Missions v. Adams, 462 U.S. 791, 795, 799-800 (1983), and Mullane v. Central Hanover Bank & Trust Co., 337 U.S. 306 (1950) (necessity of notice and voluntary, informed waiver of basic rights).[18]

1. The Legal Doctrines of "Abandonment," Implied Waiver and Simmons "Limited Use Immunity" in Cretacci Cannot be Applied Retroactively to Prejudice Mr. Plunk, who Relied on the Advice of Counsel Mandated by Existing Case Law.

The Plunk panel relied on the new rule of "limited use immunity" enunciated in Cretacci at 62 F.3d 311:

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[18]For additional authority that waiver of basic constitutional rights must be knowing and voluntary with clear notice of the consequences, that waiver may not be assumed from a silent record, and that the burden of proof of waiver is on the prosecution, see Taylor v. Whitley, 933 F.2d 325, 330 (5th Cir. 1991), cert. denied, 503 U.S. 988 (1992); Barker v. Wingo, 407 U.S. 514, 519 (1972); Miranda v. Arizona, 384 U.S. 436, 444 (1966); and Carnley v. Cochran, 369 U.S. 506, 516 (1962).

> In Cretacci, we rejected the "argument that by requiring a defendant to claim his property we force him to sacrifice his right against self-incrimination in order to preserve his right against Double Jeopardy." [Cretacci at 311.] The court pointed out that "[a] defendant's claim of ownership at a pre-trial suppression hearing of property that he contends was unlawfully seized may not be used to prove the defendant's guilt." Id. Similarly, "a defendant's claim of ownership of property that was subject to forfeiture may not be used for that purpose." Id. Plunk Memorandum at 3. (App. 2-3.)

The Cretacci reference to "pre-trial suppression hearing" is to Simmons. Prior to Simmons, whether claims of ownership to establish standing in pre-trial suppression testimony could be used at trial was an unsettled question of law, with most courts ruling against defendants. Simmons announced its new rule for the stated purpose of relieving defendants of the "Hobson's choice" which the Court found "intolerable." Simmons, 390 U.S. at 394. However, pre-Cretacci, no court had ruled such Simmons "use immunity" extended to incriminating administrative forfeiture claims of ownership. In fact, many courts have noted the expansion of said rule to other forums than constitutional suppression hearings requires a specific new rule of law. See Seattle Times Co. v. United States Dist. Ct. for the Western Dist. of Washington, 845 F.2d 1513, 1519 (9th Cir. 1988) (Reinhardt, J. concurring). In criminal prosecutions following civil forfeitures, although defendants were absolutely required to enter civil claims to contest forfeiture, and the Fifth Amendment could not be pled at the administrative level,[19] numerous commentators[20] and courts,

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[19]Attempting to assert the Fifth Amendment at the administrative level in the absence of a fatal and/or unprotected admission and claim of ownership to incriminating property, signed personally by the owner/defendant, would not have stayed or defeated summary adjudication and forfeiture under 19 U.S.C. § 1609(b). Baker v. United States, 722 F.2d 517 (9th Cir. 1983), United States v. $15,500 U.S. Currency, 558 F.2d 1359 (1977). Based on pre-Cretacci law, such fatal admissions and

including the Ninth Circuit, held incriminating statements made during such civil forfeiture proceedings were admissible in the subsequent criminal prosecutions.[21]

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claims of ownership would have been used in the parallel criminal proceedings to devastate Mr. Plunk's defense, as ownership of the property was alleged to have significant evidentiary value as proof of guilt and the linchpin in the Government's case. The Government admitted this, acknowledging under Ninth Circuit law to avoid forfeiture:

> [A] claimant to seized property [must file a] detailed claim...[which] cannot be avoided by reliance on the Fifth Amendment privilege against self-incrimination. [Citing Baker at 722 F.2d 518, $15,500.00 at 558 F.2d 1359, 1360, and Mercado v. United States Customs Service, 873 F.2d 641, 644 (2d Cir. 1989).] (Emphasis added.)

Reply Brief for United States in No. 94-30421/Answering Brief for United States in No. 93-34022 at 3-4.

The importance of Baker and $15,500 cannot be underestimated. Indeed, the Drug Enforcement Administration's "Notice(s) of Seizure" sent to Mr. Plunk contained the following warning:

> "**Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977)."

[20] See 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶10.03, 10-39 to 10-41 (1995).

[21] In United States v. Flores, 679 F.2d 173 (9th Cir. 1982), cert. denied, 459 U.S. 1148 (1983), although the "Hobson's choice" was recognized, an administrative claim letter sent as a requirement to initiate a formal civil complaint to protect Fourth Amendment rights was not constitutionally protected.

> Flores argues that *Simmons* should be extended to prevent the admission at his criminal trial of the statements he made in a formal effort to recover damages for an alleged violation of his Fourth Amendment rights. We understand, but reject the argument. Flores, 679 F.2d at 177 (emphasis added).

Similarly, in United States v. Clawson, 831 F.2d 909 (9th Cir. 1987), cert. denied, 488 U.S. 923 (1988), an affidavit of ownership of a pistol in support of a state court civil motion for return of seized items was held admissible in federal prosecution for felon in possession notwithstanding Simmons. See also United States v. U.S. Currency, 626 F.2d 11 (6th

It is clear the government had been and was exploiting this "Hobson's choice" presented by Baker and $15,500 as a strategic ploy and should now face the jeopardy consequences. Discussing the advantages of civil forfeiture over criminal forfeitures, the U.S. Department of Justice encouraged broader and more aggressive use of the civil forfeiture statutes not only because of their advantage with respect to the standard and burden of proof, but also because:

> The claimant may be deposed and disclosure of his records compelled...And, while the Fifth Amendment may still be asserted, a civil claimant risks an adverse factual finding by doing so. This possibility places the claimant in a particular bind if criminal charges against him are still pending. Asserting the Fifth Amendment may result in an adverse factual

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Cir. 1980), cert. denied, 449 U.S. 993 (1980); and Note, "Constitutional Rights in Civil Forfeiture Actions," 88 Colum. L. Rev. 390 (1988) (based on existing law, the issue was open in federal court).

> [B]y alleging an interest in the property, a claimant may also provide information that can be used against him by the state in a later criminal trial. A claimant may preserve his Fifth Amendment right only by not coming forward and alleging an interest in the property, resulting in the automatic forfeiture of the property. Such a result is virtually identical to the outcome that the Supreme Court found unconstitutional in the *Garrity-Lefkowitz* line of cases. Id. at 396-97 (emphasis added).

See also United States v. Salvucci, 448 U.S. 83, 96 (1980) (Simmons "use immunity" rule does not afford "complete protection against the 'self-incrimination dilemma,'" given the availability of use for impeachment purposes), quoting Brown v. United States, 411 U.S. 223 (1973). United States v. Hitchcock, 992 F.2d 236 (9th Cir. 1993) (uncertainty as to "use immunity" for applications for court-appointed counsel). United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896 (2d Cir. 1992) (necessity of stays at United States District Court civil forfeiture level as opposed to administrative forfeiture wherein no such procedure existed); Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir. 1979); Wohlstrom v. Buchanan, 884 P.2d 687 (Ariz. 1994); Resek v. State, 706 P.2d 288 (Alaska 1985).

> determination, while answering questions may have incriminating consequences in the criminal proceedings.
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> * * *
>
> For these reasons, the civil claimant is in a very difficult position relative to his posture in a criminal trial. ...This means that, even when tracing obstacles exist, forfeiture proceedings should be considered since the government may never be put to its proof.

U.S. Department of Justice, Asset Forfeiture training manual No. 1, November 1988, Addendum Added January 1992, "The Advantages of Civil Forfeiture," at 2 (emphasis added).

The Cretacci holding, "for the same reasons stated in Simmons, a defendant's claim of ownership at a forfeiture proceeding may not be used in a subsequent criminal proceeding," is incorrect in assuming such "use immunity" as to admissions in suppression proceedings or administrative claims existed prior to controlling judicial precedent establishing same. The Simmons Court specifically established new law for Fourth Amendment admissions. It did not reach its conclusions based upon existing law. By extending Simmons to admissions made in prior civil forfeiture proceedings, the Cretacci court has established a new rule of law despite the lack of controlling precedent.

Since Cretacci has announced a new rule of law for the Ninth Circuit, and because Mr. Plunk and his counsel relied to their detriment on existing case law and were confronted with the resulting "Hobson's choice" due to the government's strategic ploy, which precluded them from filing statements of ownership in the forfeiture proceedings, this new rule cannot be applied retroactively to Mr. Plunk to his detriment.

2. Supreme Court And Ninth Circuit Authority Establish New Decisions Mandating A Defendant To Speak To Preserve A Claim Cannot Be Applied Retroactively If The Defendant's Prior Silence Was Induced By Reliance On Prior Circuit Law.

In Luce v. United States, 469 U.S. 38 (1984), the Court held a defendant must testify to enjoy appellate review of denial of his motion to prevent impeachment with a prior conviction. However, in United States v. Givens, 767 F.2d 574 (9th Cir. 1984), cert. denied, 474 U.S. 953 (1985), the Ninth Circuit held it would be unfair to apply a new rule to a defendant who relied on prior law in choosing to remain silent but seeking to preserve his appeal rights. Id. at 578-79.

> In the instant case, Luce establishes a new principle of law which would, if applied retroactively, wreak a substantial inequity by precluding Givens from challenging the admissibility of proof of his prior convictions. Although application of the Luce principle to the present case arguably would further the purpose of the rule ... the first and third factors [Hardy factors[22]] militate so strongly against

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[22] Allen v. Hardy, 478 U.S. 255, 258 (1986). Traditional factors for whether new constitutional rules apply retroactively are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Id. at 478 U.S. 258 (citation omitted). Accord United States v. Kane, 876 F.2d 734 (9th Cir.), cert. denied, 493 U.S. 861 (1989); Barina v. Gulf Trading and Transp. Co., 726 F.2d 560, 563 (9th Cir. 1984). If the new doctrine advances determination of guilt or innocence, retroactivity is favored; if it merely deals with procedural due process, retroactivity is not afforded. Allen v. Bunnell, 891 F.2d 736, 738 (9th Cir. 1989). As demonstrated by the affidavits and findings of fact, there was reliance on pre-Cretacci standards in this case. The new Cretacci rule extending Simmons "use immunity" does not impact guilt or innocence. It must be applied prospectively and not retroactively. See, e.g., Johnson v. New Jersey, 384 U.S. 719 (1966); Miranda v. Arizona, 384 U.S. 436 (1966); Tehan v. United States, 382 U.S. 406 (1966); Linkletter v.

retroactive application that they outweigh the second factor. Givens, 767 F.2d at 578.

The Givens logic applies here. The previous rule was an administrative claim of ownership of incriminating property in a forfeiture action was admissible in a criminal case. The new Cretacci rule grants such protection but requires an administrative claim to preserve double jeopardy rights. Because Mr. Plunk's, and Mr. Plunk's counsel's silence, i.e. their decision not to file a claim, was based on and mandated by reliance on this prior law, Cretacci's new rule requiring them to affirmatively "speak," i.e. to file such a claim, cannot be applied retroactively. It is a fundamental legal premise that reliance on prior law by a defendant or counsel should not be punished. "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) (1991 Civil Rights Act amendments not retroactive).

An axiom of constitutional law is waiver of constitutional rights must be knowing, intelligent and voluntary. Johnson v. Zerbst, 304 U.S. 458 (1938). Given the law existing when Mr. Plunk and counsel were forced to not claim his seized property, it is unjust and disingenuous to say such decision was a knowing, intelligent and voluntary "abandonment" of property or "waiver" of protection against subsequent punishment. The concept of "abandonment" or "waiver" or "forfeiture" have essential elements of knowledge, notice, and voluntariness absent herein given the Hobson's choice presented based on then-existing case law.

Walker, 381 U.S. 618, 639 (1965); Griffin v. California, 380 U.S. 609 (1965) (not retroactive); Escobedo v. Illinois, 378 U.S. 478 (1964) (not retroactive); Mapp v. Ohio, 367 U.S. 643 (1961) (not retroactive); Bunnell, 891 F.2d at 738 (not retroactive).

D. The Cretacci And Plunk Holdings Extending Simmons "Limited Use Immunity" To Administrative Forfeitures And Requiring A Contested Administrative Forfeiture To Preserve Double Jeopardy Rights Is Ill-Advised From A Public Policy Perspective.

The zeal of the Cretacci and Plunk panels to extend, with no prior precedent, Simmons "use immunity" to administrative forfeitures to avoid double jeopardy implications of $405,089.23 and punish the defendants is ill-advised. In the transparent attempt to deny relief to Mr. Cretacci and Mr. Plunk, i.e. to avoid dismissal of criminal charges, the Cretacci and Plunk panels have opened the proverbial Pandora's box by affording litigants in administrative and civil forfeitures the opportunity to conduct far-ranging civil discovery procedures which enjoy Simmons "use immunity." Doing so will allow such target defendants to fully explore the government's case, and will emasculate the Jenks Act, but will nonetheless afford such litigants knowledge that the results may not be used against them, although they may certainly choose to use the fruits against the government in any subsequent criminal prosecutions. The result will in fact spawn a multitude of constitutionally protected civil forfeiture litigation, including depositions, interrogatories, etc., by defendants directed at discovery and crystallizing the government's case. This concern is undoubtedly part of Judge Kleinfeld's concurring opinion in Cretacci, wherein he indicates he would not reach the Simmons issue. Cretacci, 62 F.3d at 311 (Kleinfeld, J., concurring). Moreover, why should the court system be burdened with having to resolve a new flood of contested forfeiture actions? See, 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶12.10 at 12-141 n. 33.1 (1995) ("[A] rule which would require property owners to file a claim and go through the motions of contesting a civil forfeiture merely to preserve a double jeopardy issue has little to recommend it. Tens of thousands of uncontested forfeitures would soon find their way into court."). See also, United States v. Baird, 63 F.3d 1213 (3d Cir.), petition for cert. filed, 64 U.S.L.W. 3318 (U.S. Oct. 17, 1995). This Court should reject such extension of Simmons "limited use

immunity" or the requirement of a frivolous contest of a forfeiture as to which there may be no good faith defense merely to preserve a double jeopardy claim, as ill-advised. Even if the Court adheres to same, it cannot be applied retroactively. It is disingenuous to claim a defendant or defense counsel must have "clairvoyantly" predicted such a new rule. To simply recognize the truth, namely, that Mr. Plunk was punished, did suffer double jeopardy, and was prevented by a true "Hobson's choice" under existing law as to Simmons from filing administrative claims, will not affect many government prosecutions. Mr. Plunk and Mr. Cretacci are in a unique procedural posture, as opposed to other defendants who have not raised pre-trial double jeopardy issues concerning punitive and administrative forfeitures. The government can, in the future, avoid the double jeopardy problem simply by combining the forfeiture and criminal proceedings into one unitary proceeding, as suggested in $405.089.23. There is no need to drastically change existing law merely to compromise Mr. Plunk's and Mr. Cretacci's constitutional rights.

Accordingly, this Court should grant certiorari and rule there is no such Simmons "use immunity" in punitive forfeiture matters and/or that Mr. Plunk did not waive his double jeopardy rights by foregoing an administrative claim based on existing law, while preserving the holdings of $405.089.23 and Ursery that the government's decision to proceed by way of punitive civil forfeiture precludes later criminal prosecution for the same offense.

E. The Panel's Claim Mr. Plunk Was Not A Party To The Forfeitures, In Jeopardy, Or Punished And The Property Was Not Adjudicated As His Is Erroneous.

The Plunk Opinion at p. 3 makes the startling holding that although the 19 U.S.C. § 1609(b) Final Adjudications of Ownership/Declarations of Forfeitures/Judgments of Forfeiture and Punishment contain specific findings of Mr. Plunk as the owner of the property, they "do not rise to the level of a judicial adjudication of ownership" since they "contain computer-generated information." Such a self-

serving de minimus distinction is without merit. Is a Supreme Court or Ninth Circuit "computer or word-processor generated" opinion precedent, or does a "word-processor generated judgment" by a District Court have meaning? Most significantly, as pointed out in Mr. Plunk's briefing, between the date of the notices of seizures and the date of the actual adjudications of forfeiture, Mr. Plunk's name was actually inserted by DEA personnel, consciously and intentionally, as the owner, so as to constitute an adjudication to allow the Government and the DEA future significant tactical protection via res judicata and collateral estoppel to prevent Mr. Plunk from later claiming the property. Clearly, someone at the DEA's chief counsel's office entered the information of Mr. Plunk as the "owner" and an "inmate" in said adjudications. The focus on one being a "party" or being "placed in jeopardy" is simply misguided. The misapplication of the "attachment of jeopardy" phrase to a multiple or successive punishment challenge appears to stem from United States v. Torres, 28 F.3d 1463 (7th Cir. 1994), cert. denied, 115 S. Ct. 669 (1994). With specific findings by both Magistrate Roberts and Judge Sedwick the property was Mr. Plunk's, there is no issue of ownership. With no ownership issue, the real Torres issue is not "standing" or "abandonment" but whether double jeopardy "waiver" can be implied from coerced forbearance regarding contesting administrative forfeiture in the face of the "Hobson's choice." The Torres court held since Torres never made a claim "as a non-party, Torres was not at risk in the forfeiture proceeding" and "without risk of a determination of guilt jeopardy does not attach. ... You can't have double jeopardy without a former jeopardy." Id. at 1465, quoting Serfass v. United States, 420 U.S. 377, 391 (1975). This ignores the concept of jeopardy in a multiple punishment context is one of punishment, and the phrase "attachment of jeopardy" is significantly omitted from the Supreme Court cases that deal with the issues of multiple punishments. In a civil forfeiture proceeding, obviously there is no risk of adjudication of guilt or "incarceration" and thus no "formal" jeopardy. See Fain v. Duff, 488 F.2d 218, 225 (5th Cir. 1973), cert. denied, 421 U.S. 999 (1975). The "attachment of jeopardy" analysis overlooks that United States civil forfeiture statutes are

punishments, not prosecutions. Austin v. United States, 113 S. Ct. 2801 (1993), Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994). See also United States v. Chandler, 36 F.3d 358 (4th Cir. 1994), cert. denied, 115 S. Ct. 1792 (1995). The real issue is a "jeopardy event," i.e. risk of punishment.[23] Clearly, it was Mr. Plunk's property, as specified in the 19 U.S.C. § 1609(b) adjudications, and as specifically found by Magistrate Roberts and Judge Sedwick, he was at "risk of punishment" and was punished and thus was entitled to double jeopardy protection from multiple or successive punishment.

IX. SUMMARY AND CONCLUSION.

Factually and legally, as supported by affidavits of

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[23] United States v. Kemmish, 869 F. Supp. 803 (S.D. Cal. 1994), aff'd based upon Cretacci, 66 F.3d 336 (9th Cir. 1995), misread United States v. Scott, 437 U.S. 82 (1978), and United States v. Vaughan, 715 F.2d 1373 (9th Cir. 1983), concerning necessity of personal adjudication of guilt in administrative forfeitures. Scott held no final former jeopardy attached given a mid-trial mistrial/dismissal at defendant's request with no judgment of punishment. Vaughan held no jeopardy attached given a pre-trial dismissal with a plea bargain and no judgment of punishment. The former jeopardy event is a judgment of punishment and in either a civil or administrative forfeiture is final punitive judgment of forfeiture of property belonging to a culpable owner as recognized in Kurth Ranch, Austin, $405,089.23 and United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489 (9th Cir. 1994). Serfass, like Scott and Vaughan, held no former jeopardy bar given pretrial dismissal with no judgment of punishment. The so-called "risk of a determination of guilt" language as to jeopardy from Serfass relied upon in Torres and the Government in this case refers to risk of adjudication and judgment of punishment. Unlike questions of ownership and who was punished presented in Torres at 28 F.3d 1465-66, here there were specific adjudication(s) of punishment naming Mr. Plunk the culpable owner in the final § 1609(b) judgment(s) at the Government's insistence, specifically adding said name after notices of seizure. (App. 54-69.) The lower court so found. (App. 7, 9, 11-13, 21-22, 25-27.) See also United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996) (jeopardy focus is on risk of judgment(s) of forfeiture—not guilt).

Mr. Plunk and counsel and specifically found by Magistrate Roberts and Judge Sedwick, neither Mr. Plunk nor his counsel abandoned his property or waived double jeopardy rights. It was Mr. Plunk's property that was forfeited. He was at risk of and suffered punishment, and is entitled to a dismissal of this action on double jeopardy grounds. The new and unprecedented ruling in Cretacci that Simmons "use immunity" applies to administrative claims so as to alleviate the "Hobson's choice" presented and that frivolous, bad faith administrative forfeiture defenses are necessary to preserve double jeopardy rights are ill-advised from a public policy perspective. Even if this Court now chooses to extend and adhere to same they cannot be applied retroactively to prejudice Mr. Plunk. The truth and reality is both Mr. Plunk and counsel had no choice, based upon existing case law, but to forego administrative claims to preserve Fifth Amendment privileges, given the incriminating nature of the property the subject of the punitive forfeitures. Since the 19 U.S.C. § 1609(b) adjudications specifically found the property was Mr. Plunk's and factually it was Mr. Plunk's, as established by the nature and location of the seizures, the government's allegations in the detention hearings and indictment, and the court's findings, it is clear he suffered punishment and, accordingly, prior jeopardy. As recognized in Ursery, the focus of a "jeopardy event" is not risk of adjudication of guilt but risk of adjudication of forfeiture or punishment. Having suffered said risk, and four of such punishments, Mr. Plunk is entitled to the protection of the double jeopardy clause against subsequent prosecution based upon the offenses which served as the basis for said forfeitures; this Court should grant certiorari and so rule.

Respectfully submitted this 1st day of February, 1996.

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